No. 19-1204

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FRANK HEINDEL, PHIL LEVENTIS,

PLAINTIFFS-APPELLANTS

—— V. ——

MARCI ANDINO, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA STATE ELECTION COMMISSION, IN HER OFFICIAL CAPACITY; JOHN WELLS, CHAIR OF THE SOUTH CAROLINA STATE ELECTION COMMISSION, IN HIS OFFICIAL CAPACITY; CLIFFORD J. ELDER, AMANDA LOVEDAY, SCOTT MOSELY, MEMBERS OF THE SOUTH CAROLINA STATE ELECTION COMMISSION, IN THEIR OFFICIAL CAPACITY,

DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT COLUMBIA

BRIEF FOR DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1204 Caption: Heindel et. al. v. Andino et. al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Marci Andino, South Carolina State Election Commission Executive Director; John Wells, Chair; Clifford
(name of party/amicus)

J. Elder, Amanda Loveday, and Scott Mosely, Members; all in their official capacity.

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Wesley Aaron Vorberger Date: 2/27/2019

Counsel for: all appellees

CERTIFICATE OF SERVICE

****

I certify that on 2/27/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/Wesley Aaron Vorberger (signature) 2/27/2019 (date)

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I. Statement of the Issue

Whether the District Court correctly held Appellants failed to allege sufficient facts to support standing to challenge the constitutionality of the State of South Carolina's entire voting system, based upon the possible threat of hackers and a history of isolated mechanical malfunctions not affecting the outcome any election.

II. Summary of the Argument

Appellants have failed to allege standing for any claim in this case. Appellants allege South Carolina's voting machines are so vulnerable to hacking by third-parties, or are so susceptible to random mechanical malfunctions on Election Day, that Appellants' right to have their votes counted accurately and reliably is compromised and thus unconstitutionally burdened. However, Appellants have failed to allege that any constitutional injury resulting from third-party hackers is concrete, particularized, or "certainly impending." Rather, such an injury sounds of a generalized grievance, due to its widely-shared and abstract nature. Further, such an injury cannot be "fairly traceable" to the South Carolina State Election Commission as it would be an independent act made by a third-party not subject to the instant lawsuit. This conclusion also undermines any finding that the Court could redress the alleged harm, since a court order cannot prevent any third-party threat, general or specific, from persisting.

Likewise, as to the alleged risk of malfunctioning voting machines, Appellants have failed to plead a "substantial risk" that such malfunction will imminently occur and affect their votes. Instead, they allege only isolated incidents around the state, outside Appellants' specific counties of residence, and lacking any impact on either Appellant or the outcome of any election. Further, Appellants fail to allege a plausible injury-in-fact that is likely to be redressed by a favorable decision. Assuming the Court were to order replacement of the voting system, it is speculative whether such replacement would eliminate the type of isolated malfunctions—namely attributed to human error—alleged in the complaint. In sum, while Appellants recognize they lack the right to a perfect election, they nonetheless seek to litigate away all possible risks and issues within the voting system. They lack standing to do so.

III. Argument

Article III of the U.S. Constitution circumscribes the exercise of judicial power by requiring plaintiffs to demonstrate standing for each and every claim raised in their complaint. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). The claims in this case implicate the complex interplay between federalism and individual fundamental rights guaranteed by the U.S. Constitution. On the one hand, the U.S. Supreme Court has consistently rebuffed litigants who encourage the federal government to interfere with or oversee state-run elections.

Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("States retain the power to regulate their own elections."). On the other hand, the U.S. Supreme Court has long recognized the right to vote is fundamental and should be guarded zealously. *United States v. Classic*, 313 U.S. 299, 314 (1941). Yet before the Court can address the substantive issues raised in the complaint, Appellants must demonstrate they possess the requisite standing for the court to adjudicate their claims. They have failed to do so.

Under *Lujan v. Defenders of Wildlife*, the U.S. Supreme Court set forth what it termed the "irreducible constitutional minimum of standing," made up of three elements or prongs:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations omitted). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *see also Lujan*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497

U.S. 871, 889 (1990)). However, as will be demonstrated below, Appellants have failed to allege plausible, sufficient facts to meet this "irreducible" minimum of standing.

A. Appellants have failed to plead an injury-in-fact sufficient to support standing

The first constitutional requirement for standing, possessing an injury-in-fact to a legally protected interest, is made up of two components: (1) the injury must be "concrete *and* particularized"; and (2) the injury must be "actual or imminent." *Lujan*, 504 U.S. at 560 (emphasis added). A plaintiff's failure to demonstrate each requirement warrants dismissal for lack of standing. *Spokeo, Inc.*, 136 S. Ct. at 1548.

Here, Appellants allege South Carolina's long-used voting machines run afoul of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. J.A. at 54–57. Specifically, they allege the machines are so vulnerable to hacking by third-parties, or random mechanical malfunctions on Election Day, that the right to have their votes counted accurately and reliably is compromised and thus unconstitutionally burdened. J.A. at 56. However, these allegations, without more, are insufficient to articulate an injury-in-fact. Appellants allege an injury that is not concrete, not particularized, and not imminent.[1]

[1] It should be noted that Appellants and *amici* conflate several concepts in an effort to create smoke around the alleged threat of hacking in South Carolina. First, a voting machine is not the same thing as a voting system. A voting machine is merely one part of a larger voting system. Second, previously documented interference and

1. Appellants fail to allege an injury that is concrete.

Appellants fail to allege a concrete injury. A concrete injury is an injury that actually exists. *Spokeo, Inc.*, 136 S. Ct. at 1548. The U.S. Supreme Court uses "the adjective 'concrete' . . . to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* at 1548. "Although tangible injuries are perhaps easier to recognize, . . . intangible injuries can nevertheless be concrete." *Id.* at 1549. Indeed, in certain circumstances, even a "risk of real harm" can "satisfy the requirement of concreteness." *Id.* (citing *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998)).

Appellants allege the deprivation of their voting rights due to alleged flaws in South Carolina's voting system. J.A. at 54. In alleging their injury, Appellants succinctly state how they have been harmed. As to Appellant Heindel, a regular voter in South Carolina, he

> has devoted considerable time and money toward trying to identify and correct the serious security flaws in South Carolina's voting system, including by filing and negotiating numerous state FOIA requests and by conducting an audit of the certified results in South Carolina's November 2010 elections. He felt compelled to absorb these costs because *he believes* the state's voting system, and in particular its use of iVotronic machines, is deeply unreliable and fundamentally

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intermeddling with U.S. elections (either via social media or hacking various state websites containing voter registration information) is not the same as an attempt to hack a voting machine to alter or dilute votes. Third, previous internet traffic "hitting" the Election Commission's firewall is not equivalent to a hack attempt on South Carolina's voting system, and relatedly the iVotronic voting machines.

> unverifiable. *Mr. Heindel reasonably believes that these unaddressed flaws impact his right to have his vote counted accurately*.

J.A. at 18–19 (emphasis added). Mr. Heindel does not allege his vote has ever gone uncounted or been diluted, or that he will change his voting practices in the future. As to Appellant Leventis, also a regular voter in South Carolina, he,

> [b]ased on his experiences as a state senator and South Carolina voter, . . . has *longstanding concerns* about the accountability, auditability, and transparency of the iVotronic based system. *He reasonably believes that the flaws in South Carolina's voting system burden his right to have his vote counted fairly and accurately*.

J.A. at 19 (emphasis added). Mr. Leventis, likewise, does not allege his vote has ever gone uncounted or been diluted, or that he will change his voting practices in the future. Appellants' complaint then goes on to survey dated studies addressing the potential vulnerabilities of iVotronic voting machines in other states, as well as heavily redacted reports and communications discussing South Carolina's security posture and voting system in recent years (yet failing to reveal what the vulnerabilities were or how they were remediated).

Here, Appellants' complaint fails to state a concrete injury for two reasons. First, Appellants do not allege a tangible injury. There are zero allegations the tangible votes of either Appellant have been or will be miscounted or not counted in the future due to the alleged flaws or hacking—merely that such an injury from hacking or malfunction is hypothetically possible. *Stein v. Cortes*, 223 F. Supp. 3d 423, 432 (E.D. Pa. 2016) ("Although Mr. Reitz is a Pennsylvania voter, he has not

alleged that his vote was inaccurately recorded or tallied in the final Pennsylvania vote count. Plaintiffs' allegation that voting machines may be 'hackable,' and the seemingly rhetorical question they pose respecting the accuracy of the vote count, simply do not constitute injury-in-fact."). Instead, Appellants allege an intangible harm, grounded in their beliefs and concerns formed in light of various third-party reports and studies, that their right to vote has been or will be "burdened" due to the threat of hacking or possible malfunction at some undiscernible time in the future.

Second, while it is true that certain intangible injuries with a "risk of real harm" can satisfy the requirement of concreteness, Appellants fail to plausibly allege an injury with a real, as opposed to speculative or hypothetical, risk of harm to them in particular. *Infra* Part III.A.2–3; *see also Landes v. Tartaglione*, No. CIV.A. 04-3163, 2004 WL 2415074, at *3 (E.D. Pa. Oct. 28, 2004), *aff'd,* 153 F. App'x 131 (3d Cir. 2005) (citing *Lujan,* 504 U.S. at 564) ("If plaintiff's vote and the votes of all other voters in the upcoming election are correctly recorded, plaintiff will suffer no injury. Plaintiff's reliance on the terms 'if' and 'may' to couch her allegations of harm is a clear indication that the harm she alleges is merely speculative.").

What is more, Appellants cannot point to a congressional statute identifying Appellants' alleged intangible injuries in an effort to show the concreteness requirement has been met. *See Spokeo, Inc*, 136 S. Ct. at, 1549 (quoting *Lujan*, 504 U.S. at 578) ("[B]ecause Congress is well positioned to identify intangible harms

that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"); *see, e.g., Akins*, 524 U.S. at 20–25 (finding an "informational injury" was a sufficiently concrete injury-in-fact when Congress had mandated by federal statute the information at issue to be disclosed to the public).

Lastly, "beliefs" and "longstanding concerns" alone are insufficient to confer standing. *Cf. United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)) (recognizing, in the organizational standing context, "a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to . . ." to confer standing). While the Complaint does go into painstaking detail analyzing these and other machines and quotes extensively from independent sources, those reports and studies fail to address how Appellants specifically and actually—not generally and hypothetically have been or run the "substantial risk" of being injured by South Carolina's voting system. In sum, Appellants fail to allege a concrete injury in their complaint.

2. Appellants fail to allege a particularized injury, and instead assert a generalized grievance.

In addition to alleging a "concrete" injury, Appellants must show the injury is particularized to them. That is, the injury affects them "in a personal and individual

way." *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). Like concreteness, to establish a particularized injury "[t]he complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract' . . . ." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth*, 422 U.S. at 500). "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance . . . [provided] each individual suffers a particularized harm." *Spokeo, Inc.*, 136 S. Ct. at 1548 n.7. To avoid being labeled a generalized grievance, "[t]here must be some connection between the plaintiff and the defendant that '[]differentiate[s]' the plaintiff so that his injury is not 'common to all members of the public.'" *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019) (quoting *Richardson*, 418 U.S. at 177). It is well settled that "[a] federal court is not 'a forum for generalized grievances,' and the requirement of such a personal stake 'ensures that courts exercise power that is judicial in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Lance,* 549 U.S. at 441).

Appellants posit their injury is sufficiently concrete and particularized because the complaint alleges a violation of Appellants' individual voting rights, irrespective of the number of similarly situated voters. Appellant Br. 41. Yet merely alleging a claim in the voting rights context is not a golden key that unlocks the courthouse doors. It may be true this Court has recognized a widely shared injury

does not always equate to a generalized grievance. *See Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009) (holding the plaintiffs lacked standing but recognizing a harm of a "widely shared nature does not preclude a finding that [the plaintiff] has suffered an injury in fact . . ."). But, as evidenced by the lack of standing in *Bishop*, such a rule does not shield Appellants' complaint from having to demonstrate a particularized injury, notwithstanding the implication of voting rights. *Gill*, 138 S. Ct. at 1931 (holding the U.S. Supreme Court's precedent has yet to find standing when faced with a statewide harm, alleged by voters in the redistricting context, which goes beyond an "injury they have suffered as individual voters . . . ."); *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Indeed, the general rule regarding constitutional claims shared by a large class of citizens is that they are normally considered generalized grievances. *See Warth*, 422 U.S. at 499.

An alleged injury is considered an impermissible generalized grievance when it is (1) "widely shared" and (2) "abstract and indefinite [in] nature." *Akins*, 524 U.S. at 23. In *Akins*, a group of voters filed a complaint with the Federal Election Commission alleging the American Israel Public Affairs Committee ("AIPAC") should have been treated as a "political committee" or "PAC." *Id.* at 15–16. Such treatment would have imposed various contribution limits and disclosure requirements on AIPAC—providing the plaintiffs with valuable information for evaluating political candidates. *Id.* at 17, 21. The FEC ultimately dismissed the

complaint, and eventually the district court did the same. *Id.* Ultimately, the Supreme Court granted *certiorari* to address in part whether the plaintiffs possessed standing to challenge the FEC's decision. *Id.*

The Court held, *inter alia*, the plaintiffs possessed standing in spite of the widely shared nature of their injury. *Id.* at 22. The Court found the plaintiffs had sufficiently articulated an injury-in-fact by alleging a concrete informational injury: AIPAC's lack of disclosure in the face of a congressional statute compelling disclosure. *Id.* at 21. While finding the dissent's reliance on *Richardson* to be misplaced, due to the different right asserted therein (statutory in *Akins* and constitutional in *Richardson*),[2] the Court nonetheless found *Richardson* relevant in determining whether the plaintiffs had raised a generalized grievance. *Id.* at 23.

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[2] It is worth noting that Appellants fail to address the type of claim at issue in *Akins*, *i.e.*, the violation of a federal statute. Here, in contrast, Appellants allege the violation of a constitutional provision, which the Supreme Court recognizes is treated differently and requires a showing of a "logical nexus between the status asserted and the claim sought to be adjudicated." *Richardson*, 418 U.S. at 174–75.

> Here, there is no constitutional provision requiring the demonstration of the 'nexus' the Court believed must be shown in *Richardson* and *Flast*. Rather, there is a statute which, as we previously pointed out, *supra*, at 1783, does seek to protect individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities.

Akins, 524 U.S. at 22. Thus, it remains an open question whether a plaintiff, by merely asserting his or her status as a citizen of South Carolina, can challenge the constitutionality of an entire statewide voting system as unreliable or inaccurate under the Fourteenth Amendment, based solely upon his or her longstanding belief

The Court recognized: "Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Id.* at 23. The Court went on to qualify this conclusion, however, by noting the harm at issue must "not only [be] widely shared, but [] also of an abstract and indefinite nature . . . ." *Id.* Accordingly, the Court reasoned that because the plaintiffs' informational injury was already determined to be concrete, it could not be a generalized grievance.

> Such [a widely-shared] interest, where sufficiently concrete, may count as an "injury in fact." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), *or where large numbers of voters suffer interference with voting rights conferred by law*. Cf. *Lujan, supra,* at 572, 112 S.Ct., at 2142–2143; *Shaw v. Hunt,* 517 U.S. 899, 905, 116 S.Ct. 1894, 1900–1901, 135 L.Ed.2d 207 (1996). We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared *does not deprive Congress of constitutional power to authorize its vindication in the federal courts.*

Id. at 25 (emphasis added).

While the injury alleged here is constitutional as opposed to statutorily "conferred by law," the generalized grievance framework articulated in *Akins* remains instructive. First, it is not contested that Appellants' injury is "widely

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or concern in light of independent reports alleging vulnerabilities and harms not personally experienced by the plaintiff.

shared." Appellant Br. 41. Indeed, their alleged injury is shared by the entire South Carolina electorate—at least 1.70 million voters.[3] *See also* J.A. at 747 ("Furthermore, numerous times throughout their pleadings, Plaintiffs assert that their alleged injury—the possibility their vote will not be accurately counted due to the malfunctioning or hacking of South Carolina's iVotronic voting machines—is shared by 'all South Carolina voters.'"). Stated differently, any concerned South Carolina citizen who has voted or desires to vote could substitute his or her name in the complaint for either Appellant without substantively modifying any of the allegations. All that is required is that they "believe" or have "longstanding concerns" that South Carolina's voting system is flawed. Thus, the initial hallmark of a generalized grievance is satisfied.

Second, the injury here lacks the concreteness necessary to overcome the label of an "abstract" and generalized grievance. As demonstrated above, *see* Part III.A.1., Appellants have failed to plausibly allege a concrete injury that is either tangible or intangible and posing a risk of harm. In *Akins*, the plaintiffs' injuries were considered

[3] This figure is based upon the results of the 2018 South Carolina Governor's race. *South Carolina State Election Commission*, 2018 Statewide General Elections, November 6, 2018, available at https://www.enr-scvotes.org/SC/92124 /Web02-state.222648/#/ (last accessed Apr. 10, 2019); *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (collecting cases) ("This court and numerous others routinely take judicial notice of information contained on state and federal government websites."); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (recognizing that taking such judicial notice is not impermissible under Rule 12(b)).

concrete because they were being deprived of specific information in contravention of a clear federal statute. While intangible in nature, the type of injury alleged (informational) was essentially codified.

Here, however, Appellants attempt to allege the deprivation of their constitutional right to vote generally, based upon their reasonable beliefs and longstanding concerns about the voting system generally, together with the current "threat environment" generally, which could result in a constitutional violation specific to them at some point in the future. This alleged future constitutional injury (which is not certainly impending, has gone unrecognized by federal statute, and is to be shared by the entire South Carolina electorate—if it were ever to occur) is both abstract and indefinite. To consider such an injury concrete would be to embellish Appellants' allegations to say something that they do not: these specific Appellants are subject to a "certainly impending," particularized constitutional injury-in-fact.

In sum, it is clear from the complaint that Appellants allege a generalized grievance, "since the impact on [Appellants] is plainly undifferentiated and 'common to all members of the public.'" *Richardson*, 418 U.S. at 176–77 (citations omitted). Try as they might, Appellants' various studies and reports cannot distract from the simple fact that they have not alleged anything specific to themselves beyond a generalized *possible* risk of harm that could result in a constitutional

violation at some undiscernible time in the future. This does not satisfy the requirement that an injury-in-fact be particularized to the Appellants.

3. Appellants fail to allege an imminent injury.

Under *Lujan*, Appellants must also allege their injury is "actual or imminent," rather than "conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Specifically, "[w]here there is no actual harm," but rather an alleged future harm, "its imminence (though not its precise extent) must be established." *Id.* at 564 n.2. As it pertains to alleging an imminent injury, the Supreme Court has articulated the imminence requirement in two ways: (1) there must be a "certainly impending" injury, *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); or (2) there must be a "substantial risk" that the injury will occur, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Under either standard, Appellants fail to plausibly allege an imminent injury.[4]

a. Appellants have not alleged a "certainly impending" injury.

The Supreme Court has long recognized that when a court is faced with allegations of a future injury, "the 'threatened injury must be *certainly impending* to

[4] Appellants' argue Judge Childs applied the wrong standard—requiring the "injury to be certain." Appellant Br. 18. This is incorrect and a mischaracterization of both Judge Child's and *Clapper*'s holdings. *Clapper*, 568 U.S. at 414, n.5. While the lower court did largely rest its holding on *Clapper*'s "certainly impending" standard, *see* J.A. at 724, Judge Childs nonetheless addressed the "substantial risk" standard and found it was not met. *See* J.A. at 732; J.A. at 735. Nowhere did the district court require Appellants' allege a "certain" injury. Only that Appellants plausibly allege one that is imminent—something they have failed to do.

constitute injury in fact . . . [and] allegations of possible future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (emphasis in original) (quoting *Whitmore,* 495 U.S. at 158). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* at 409 (emphasis in original) (quotations omitted) (quoting *Lujan*, 504 U.S. at 565 n.2).

As an initial matter, it is important to note that *Clapper* is both applicable and highly relevant here. Appellants seem to question the applicability of *Clapper* at the motion to dismiss stage because it was dismissed at summary judgment. Appellant Br. 34. Yet courts have frequently analyzed standing at the motion to dismiss stage utilizing the framework set forth in *Clapper*, and *Lujan* for that matter (which was also adjudicated at the summary judgment stage). *See, e.g., Driehaus*, 573 U.S. at 158; *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019); *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir.), *cert. denied sub nom. Beck v. Shulkin*, 137 S. Ct. 2307 (2017). This Court should decline Appellants invitation to disregard or minimize this controlling precedent.[5]

[5] Further, Appellants' effort to undermine *Clapper*'s relevancy by citing this Court's decision in *Wikimedia* is unavailing. In *Wikimedia*, this Court did, indeed, warn of "blurr[ing] the line between the distinct burdens for establishing standing at the motion-to-dismiss and summary judgment stages . . . ." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 212 (4th Cir. 2017). But this Court went on to say that

A "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 410. In *Clapper*, the plaintiffs raised a constitutional challenge to § 1881a of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801, *et seq. Clapper,* 568 U.S. at 405. The plaintiffs, comprised of attorneys and various public interest organizations, believed the FISA subjected them to unconstitutional surveillance as they carried out their work. *Id.* at 406. The plaintiffs asserted that because they were required to "engage in sensitive and sometimes privileged" communications with potentially surveilled individuals abroad, the FISA compromised their ability "to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients." *Id.*

In the lower court, the plaintiffs asserted two theories of standing:

> First, they claim that there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future, thus causing them injury. Second, [plaintiffs] maintain that the risk of surveillance under § 1881a is so substantial that they have been forced to take costly and burdensome measures to protect the

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the lower court's overreliance on *Clapper* "had the effect of rejecting Wikimedia's well-pleaded allegations and impermissibly injecting an evidentiary issue into a plausibility determination." *Id.* Here, neither the lower court nor the Appellees are contending that Appellees need more evidence. Rather, the issue is with Appellants' allegations—which lack the plausible, "well-pleaded" injuries that were present in *Wikimedia.* Moreover, the plaintiffs in *Wikimedia* alleged an injury that was "actual and ongoing" as opposed to "prospective or threatened." *Id.* at 211. Thus, this Court correctly found that *Clapper* was inapposite given the facts. Here, however, Appellants attempt to allege a "prospective or threatened" injury, which brings *Clapper*'s "certainly impending" analysis to the fore. *Id.*

> confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to § 1881a.

Id. at 407. The district court found the plaintiffs lacked standing. *Id.* However, the U.S. Court of Appeals for the Second Circuit reversed, finding the plaintiffs established an "objectively reasonable likelihood that their communications will be intercepted at some time in the future," and that they were suffering from "*present* injuries in fact . . . stemming from a reasonable fear of *future* harmful government conduct." *Id.* (emphasis in original).

The Supreme Court reversed, holding the plaintiffs lacked any "certainly impending" injury necessary to confer standing. *Id.* at 414. At the outset, the Court rejected the Second Circuit's "objectively reasonable likelihood" standard as inconsistent with the "certainly impending" injury requirement.[6] *Id.* at 410. The Court then went on to find that the plaintiffs' standing theory relied "on a highly attenuated chain of possibilities," based upon their "highly speculative fear" of

[6] Appellants' allegations in many ways appear to echo the debunked rationale of the Second Circuit. J.A. at 18–19 (alleging the Appellants "reasonably believe" the alleged flaws impact their right to vote). Any allegations asserting it is "reasonably likely" the current voting system is so vulnerable or unreliable as to result in a constitutional violation caused by third-party hackers would be insufficient to confer standing under *Clapper*. *Cf. Beck*, 848 F.3d at 276 ("Accordingly, neither the VA's finding that a 'reasonable risk exists' for the 'potential misuse of sensitive personal information' following the data breaches, nor its decision to pay for credit monitoring to guard against it is enough to show that the Defendants subjected the Plaintiffs to a 'substantial risk' of harm.").

numerous independent government actions that would result in harm to the plaintiffs. *Id.* at 410. This "chain of possibilities" was comprised of five speculative links:

> (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts

Id.

The Court found each link of the chain infected with impermissible speculation. As to the government's targeting practices—the plaintiffs had "no actual knowledge," just assumptions and speculation. *Id.* at 411–12. As to whether the government would actually use § 1881a to surveille the plaintiffs or their associates—the plaintiffs could "only speculate" given the "numerous other methods of conducting surveillance," which were not before the Court. *Id.* at 412–13. As to authorization by the FISA Court—the plaintiffs could "only speculate as to whether [it would] authorize such surveillance." *Id.* at 414. As to whether the government would succeed in intercepting information from the plaintiff's contacts—that was "unclear," even assuming they had approval from the FISA Court. *Id.* Lastly, as to whether the plaintiffs would be parties to the intercepted communications—the plaintiffs could "only speculate." *Id.* In sum, the chain of possibilities was too

attenuated, too speculative, to allege a "certainly impending," imminent injury-in-fact. *Id.*

Here, Appellants' complaint falls prey to the same ills that plagued the plaintiffs in *Clapper*. Like the speculative injury in *Clapper*, here Appellants' alleged future injury resulting from third-party hackers rests squarely upon a speculative and highly attenuated chain of possibilities:

(1) South Carolina's elections are currently being targeted by third-party hackers;

(2) South Carolina will use the iVotronic voting system in 2020;

(3) The iVotronic voting system will be successfully breached by third-party hackers;

(4) The breach will result in the alteration or dilution of Appellants' votes; and

(5) The breach will go undetected and un-remediated by the Election Commission,

resulting in a violation of Appellants' Fourteenth Amendment rights. *See, e.g.,* J.A. at 16 ("Because the iVotronic system is used statewide, its vulnerabilities impair the reliability of elections in every precinct and county. Those inherent vulnerabilities are exacerbated by the varying cybersecurity practices employed in each county. As a result, a hacker *might* cause largescale disruption by attacking one or more

counties, *potentially* creating distrust and confusion that *could* affect the entire state." (emphasis added))

"As discussed below, [Appellants'] theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. First, the Court must assume in the absence of any allegations, that South Carolina is specifically being targeted for such a cyber-attack by third-parties. Second, even if there were such allegations, the Court must then assume that the iVotronic voting system will be used in the upcoming 2020 elections, despite the ongoing procurement of a new state-of-the-art voting system. Third, provided the Court speculates that South Carolina is being targeted (which is not alleged) and assumes the iVotronic voting system will be used (which is doubtful), the Court must then assume that third-party hackers, not currently before the Court, will successfully breach the voting system—something Appellants have not alleged has ever happened or will imminently happen in South Carolina. Fourth, in order to state a constitutional injury, the Court must speculate that a hack will somehow affect the Appellants' votes and, fifth, go undetected by the Election Commission—something, again, that Appellants have not alleged has ever happened in South Carolina. It is clear that Appellants alleged injuries resulting from a future hack of South Carolina's voting system are simply too speculative to confer standing. The

first two links in the speculative chain of possibilities show just how far away Appellants' actually are from alleging a "certainly impending" injury at the hand of third-party hackers.

i. Appellants have failed to plead that South Carolina is being specifically targeted by third-party hackers.

First, and perhaps most importantly, Appellants have not alleged any of South Carolina's elections have been specifically targeted for an imminent cyber-attack. While it is alleged a number of states have been targeted in the past, Appellants fail to allege South Carolina is among them. J.A. at 49. Simply alleging an amorphous threat of cyber-attacks on America's election infrastructure, and that South Carolina's voting system is vulnerable or the machines unreliable, amounts to a *possible* injury—not a *plausible* one. *Clapper*, 568 U.S. at 409 ("'[A]llegations of *possible* future injury' are not sufficient." (emphasis in original) (citation omitted)). A possible and conclusory allegation is transformed into a plausible one when a plaintiff articulates the imminence of the alleged harm specifically (*i.e.,* South Carolina is currently being targeted for such an attack). Appellants have failed to do this, and so the Court is left to speculate as to whether hackers will target South Carolina's voting system *specifically* in the future. *See Clapper*, 568 U.S. at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

In *Curling v. Kemp*, a case with identical constitutional claims to those here, the district court found standing to adjudicate the threat of a future cyber-attack on Georgia's voting system. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1314 (N.D. Ga. 2018), *aff'd in part, appeal dismissed in part sub nom. Curling v. Sec'y of Georgia*, No. 18-13951, 2019 WL 480034 (11th Cir. Feb. 7, 2019). Notably, there the plaintiffs alleged that such a cyber-attack had already occurred and was going to happen again:

> [Defendants'] arguments [against standing] are unavailing. For one, Plaintiffs have alleged that the DRE voting system was *actually* accessed or hacked multiple times already – albeit by cybersecurity experts who reported the system's vulnerabilities to state authorities, as opposed to someone with nefarious purposes. . . . Contrary to Defendants' characterizations, Plaintiffs' allegations are not premised on a theoretical notion or "unfounded fear" of the hypothetical "possibility" that Georgia's voting system might be hacked or improperly accessed and used. Plaintiffs allege that harm has in fact occurred, specifically to their fundamental right to participate in an election process that accurately and reliably records their votes and protects the privacy of their votes and personal information.

Curling, 334 F. Supp. 3d at 1314–15 (emphasis in original). At bottom, an allegation of successful prior hack attempts, in Georgia specifically, was paramount to the Court finding the plaintiffs had standing to bring their claims.

Yet here, Appellants have alleged no such prior hacking and no such specific targeting of South Carolina's voting system. Accepting the allegations as true, which we must, *Warth*, 422 U.S. at 501, even if the iVotronic machines are vulnerable to hacking, and even if nefarious third-parties desire to do America harm generally,

without an allegation that South Carolina is specifically being targeted, such a cyber-attack remains a hypothetical possibility requiring a chain of possibilities to occur. As such it is not a "certainly impending" injury-in-fact. *See, e.g., Beck*, 848 F.3d at 275 (holding allegations, assumed to be true, that personal identifiable information had been stolen did not, "without more," "confer Article III standing, when the Court was still required to 'engage with the same 'attenuated chain of possibilities' rejected by the Court in *Clapper*.'"). What is more, the Court cannot embellish Appellants' "otherwise deficient allegations" to create standing. *Whitmore*, 495 U.S. at 155–56. That burden of pleading sufficient facts belongs to the Appellants alone. *Bishop*, 575 F.3d at 424.

The reports and studies provided by Appellants' in their complaint do not alter this conclusion. For example, the "EVEREST" Report addresses only the security of the iVotronic voting machines as they stood in 2007, making no mention of whether the machines, much less South Carolina's machines, are currently being targeted. J.A. at 560 ("The goal of [the "EVEREST" Report] was to assess the security of electronic voting systems used in Ohio, and to identify any procedures that may eliminate or mitigate discovered issues."). Next, the Cyber Hygiene ("CyHy") Reports show "a comprehensive weekly snapshot of known vulnerabilities detected on *Internet-facing hosts* for the SC State Election

Commission"[7]—not whether those vulnerabilities were being targeted for exploitation.[8] J.A. at 79 (emphasis added). Likewise, the county-by-county security posture assessments, developed by the South Carolina National Guard Defensive Cyber Operations Element, show only potential vulnerabilities existed, not whether they have since been remediated or are currently targeted by would-be third-party hackers. J.A. at 355; J.A. at 367; J.A. at 381. Lastly, the Legislative Audit Council ("LAC") Report, reviewing the state's use of the iVotronic voting machines, analyzed a prior version of the voting system (previously 3.0.1.1, J.A. at 494, as opposed to the current 4.0.0.3, Version 4[9]) and made recommendations to remediate potential issues with election administration as it stood leading up to 2013. J.A. at 479. Like the other reports, it did not address whether any issues were remediated

[7] The election management system and iVotronic voting machines are not considered "internet-facing host[s]," much less accessible from the internet. *See South Carolina State Election Commission,* Voting System Facts, available at https://www.scvotes.org/voting-system-facts (last accessed on May 6, 2019) ("The touch screen machines are not accessible to wireless or wire-based computer systems, nor are they connected to phone or network lines.").

[8] It should also be noted that, according to the provided CyHy reports, which span September 18, 2016 to November 3, 2016, all known vulnerabilities spanning all levels of severity were resolved, with only one newly discovered "low" vulnerability remaining unresolved—according to the last provided report. J.A. at 329.

[9] *South Carolina State Election Commission*, December 19, 2018 Commission Meeting Minutes, available at https://www.scvotes.org/sites/default/files/2018%20Meeting%20Minutes%20(for%20web).pdf (last accessed on Apr. 30, 2019).

by the Election Commission or have been exploited or targeted by third-party hackers.

Moreover, it is telling that the district court in *Curling* did not rest its standing determination upon studies conducted by third parties on systems in different states. Rather, the Court found standing based upon specific allegations of successful attempted cyber-attacks on the voting system at issue and plausible allegations of future hacking:

> Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large. Despite being aware of election system and data cybersecurity threats and vulnerabilities identified by national authorities and the DRE system's vulnerability to hacking as early as August 2016 – when Logan Lamb, the computer scientist, first alerted the State's Executive Director of the CES of his ability to access the system – Defendants allegedly have not taken steps to secure the DRE system from such attacks.

Curling, 334 F. Supp. 3d at 1316. *See also Manship v. Virginia Bd. of Elections*, No. 3:16-CV-00884-JAG, 2016 WL 6542842, at *2 (E.D. Va. Nov. 3, 2016) (finding the plaintiff lacked standing when "the complaint allege[d] *possible* vulnerabilities in the electronic voting system and reference[d] past elections, but offer[ed] no plausible evidence to show that anyone ha[d] exploited or will exploit the alleged vulnerabilities" in an upcoming election).

Yet no such plausible allegation of a future threat, based upon un-remediated vulnerabilities or successful hack attempts, has been alleged here. Indeed, to the contrary, the CyHy Reports and Election Commission communications show the

Election Commission has taken a proactive approach and has worked steadily to resolve any and every issue within their control. J.A. at 329; J.A. at 438–39; J.A. at 427 ("The State Election Commission (SEC) worked together and cooperated fully with the Division of Information Security (DIS) and the Division of Technology (DTO) during this [risk assessment] process to *identify and remediate vulnerabilities and strengthen our election infrastructure*." (emphasis added)). Much like in *Clapper* where it was speculative whether the plaintiffs' communications were targeted by the government, here it is speculative whether the voting system used by Appellants is being targeted by hackers at all.

In sum, while Appellants do plausibly allege that the iVotronic machines *can be* hacked in certain circumstances, they fail to plausibly allege it is "certainly impending" that the South Carolina voting machines specifically *will be* hacked by third-parties in the future.

ii. Appellants assume the iVotronic system will be used in future elections.

Second, even if Appellants plausibly alleged that South Carolina was being specifically targeted (which they do not), the Court must assume the State of South Carolina will use the same iVotronic voting system in the upcoming 2020 presidential primaries and general elections. This assumption is largely undermined by the Election Commission's recent progress towards procuring a new state-of-the-art voting system for the upcoming 2020 statewide elections. *See South Carolina*

State Election Commission, Voting System Replacement News and Information, available at https://www.scvotes.org/voting-system-replacement-news-and-information (last accessed Apr. 15, 2019). While the process of replacing the current voting system has been years in the making, implementation of a new statewide voting system is imminent. Like the alternative methods of surveillance available to the government in *Clapper*, here Appellants can only speculate as to whether they will cast their votes on the iVotronic voting system and not the alternative system currently being procured by the Election Commission in accordance with a Request for Proposals, which Appellants have recognized would be acceptable.[10]

* * *

It is undoubtedly true that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). However, precedent does not permit Appellants to allege a "certainly impending" injury that is to occur "at some indefinite future time." *Lujan*, 504 U.S. at 564, n.2. Yet this is precisely the type of injury Appellants have attempted to allege. In order to find standing, the Court has to speculate as to what third-party hackers may attempt to do based on either antiquated studies, comments made regarding a general threat of cyber-warfare across the U.S., redacted reports,

[10] "The [Request for Proposals seeking a new statewide voting system] as issued is consistent with the relief that we would seek. . . . Their RFP is good." J.A. at 679.

or other states' voting systems. In sum, Appellants have failed to plausibly allege a "certainly impending" injury from the threat of third-party hackers to South Carolina's voting system. Thus, as to this injury, Appellants lack standing for want of an imminent injury-in-fact.

b. Appellants have not alleged a "substantial risk" of injury.

When a plaintiff makes an allegation of future injury, such an allegation "may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Driehaus*, 573 U.S. at 158 (citing *Clapper*, 568 U.S. at 414, n.5. Thus, appellants are correct that pleading a "substantial risk" of future harm could suffice to show an imminent injury-in-fact. However, there can be no "substantial risk of harm" if an injury is based upon an "attenuated chain of inferences":

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. . . . *But to the extent that the "substantial risk" standard is relevant and is distinct from the "clearly impending" requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here*. . . . In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about "'the unfettered choices made by independent actors not before the court.'"

Clapper, 568 U.S. at 414, n.5 (emphasis added) (citations omitted).

Stated differently, satisfying the "substantial risk" standard is impossible when a plaintiff's alleged harm is not "certainly impending." *Id.* Here, Appellants find themselves in the same position. Like the plaintiffs' harm in *Clapper*, Appellants' injury (that their right to vote will be allegedly deprived by the threat of third-party hackers and a vulnerable voting system) rests upon a speculative chain of possibilities that cannot support the weight of standing. *Supra* Part III.A.3.a. Further, Appellants, like those in *Clapper*, have also failed to plead concrete facts that the Election Commission has actually "caused the substantial risk of harm." *Clapper*, 568 U.S. at 414, n.5; *supra* Part III.A.1; *infra* Part III.B. In short, Appellants failure to plead a "certainly impending" harm forecloses on their being able to show they have pled a "substantial risk" of that harm occurring. Thus, the Court is without a means to hold Appellants' alleged injuries, at the hands of third-party hackers, are imminent.

i. Binding and persuasive precedent does not support Appellants' position that they have plausibly alleged a "substantial risk" of harm from third-party hackers or voting machine malfunctions.

Undeterred by *Clapper*'s holding, Appellants go on to cite to several cases in support of their position that they have plausibly alleged a "substantial risk" their votes will be jeopardized (either by malfunctioning iVotronic voting machines or third-party hackers). *See Driehaus*, 573 U.S. 149; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir.

2014); *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated* (July 21, 2006), *superseded,* 473 F.3d 692 (6th Cir. 2007); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *Curling*, 334 F. Supp. 3d at 1303; *N. Carolina State Conference of NAACP v. N. Carolina State Bd. of Elections*, 283 F. Supp. 3d 393 (M.D.N.C. 2017); *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). Yet each of these cases possess critical factual distinctions rendering them unsupportive to Appellants' position.

To begin, several of the cases cited by Appellants involve challenges to standing where an allegedly unconstitutional enactment is at issue. *See, e.g., Driehaus*, 573 U.S. at 166 ("The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution [under the allegedly unconstitutional statute]. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case."); *Monsanto Co.*, 561 U.S. at 155 (finding respondents, alfalfa farmers and environmental groups, had standing to challenge proposed de-regulation by the Secretary of Agriculture as violative of federal law when the de-regulation would give rise to a "significant risk" of harmful "gene flow to non-[GMO] varieties of alfalfa . . . ."); *Santillanes*, 546 F.3d at 1319 ("Although the City argues that the bases identified by the district court to show injury are speculative or non-existent,

. . . the fact remains that the individual Plaintiffs will still be required [under allegedly unconstitutional voter identification statute] to present photo identification that must be accepted if they vote in-person whereas those voting absentee will not."); *Sandusky Cty. Democratic Party*, 387 F.3d at 574 (holding the plaintiffs had standing to challenge the Ohio Secretary of State's directive regarding the issuance of provisional ballots under the Help America Vote Act). In each of the above cases there is an existing statute, regulation, directive, or policy that makes clear a "substantial risk" of an imminent future harm on the face of the enactment. That is to say, the collision course of implementing a purportedly unconstitutional course of action and infringing upon a plaintiff's recognized constitutional or federal rights is apparent by comparing and contrasting the text of a statute or policy to the controlling legal provisions.

However, no such allegedly unconstitutional enactments exist here. None of Appellants alleged future constitutional injuries emanate from black-and-white government policies. What is more, to argue that a policy is the functional equivalent of a voting machine is absurd. One is an articulated legal position prescribing or proscribing a certain course of conduct—the other is an inanimate object. Yet the appeal of creating such an equivalency is readily apparent: if voting machines could be unconstitutional *per se*—just like unconstitutional statutes or policies—then the task of plausibly alleging a "substantial risk" of future harm becomes easier, since

one can simply point to the voting machines and allege that such harm is inherent to their use alone. But in the voting machines context, precedent requires Appellants to plead a "substantial risk" of future harm by plausibly alleging facts showing, at the very least, South Carolina's machines are being, or have been, targeted for an imminent cyber-attack or there is a history of malfunctioning machines in their respective counties resulting in constitutional injuries. *Curling*, 334 F. Supp. 3d at 1316; *Stewart*, 444 F.3d at 854. Appellants have alleged neither.

Requiring such allegations is consistent with the other cases cited by Appellants. Generally, when courts confer standing on individuals in the voting rights context, they do so when they are able to look to past or ongoing incidents as indicative of a plausible future injury.[11] *See, e.g., Arcia*, 772 F.3d at 1341 (holding the individual plaintiffs had standing to challenge a voter purge because "they were directly injured" by a prior voter purge *several years prior* and "at the time they filed their complaint, they had established a probable future injury . . . ."); *Stewart*, 444 F.3d at 855 ("It is *inevitable*, however, that errors *have been made* and *will be made* in the future. As the district court found, '[a] flaw in the punch card ballot is its

[11] Similarly, courts in the closely analogous data breach litigation context normally require allegations of past incidents or injuries to indicate the threat or risk of future harm. *See, e.g., Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 531 (D. Md. 2016) ("In the absence of specific incidents of the use of stolen data for identity fraud purposes, district courts have generally found that the increased risk of identity theft does not confer standing.") (collecting cases).

fragile nature and the fact that running the punch card ballots repeated times through the counting machinery will result in different results.' The claims of the plaintiffs here are not speculative or remote, but real and imminent." (emphasis added));[12] *Curling*, 334 F.Supp.3d at 1315–16 ("Plaintiffs allege that harm *has in fact occurred*, specifically to their fundamental right to participate in an election process that accurately and reliably records their votes and protects the privacy of their votes and personal information. [Citing over two dozen paragraphs in the complaint referencing specific instances of disenfranchisement to various plaintiffs] . . . . Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large. Despite being aware of election system and data cybersecurity threats and vulnerabilities identified by national authorities and the DRE system's vulnerability to hacking *as early as August 2016 – when Logan Lamb, the computer scientist, first alerted the State's Executive Director of the CES of his ability to access the system – Defendants allegedly have not taken steps to secure the DRE system from such attacks*." (emphasis added)); *N. Carolina State Conference of NAACP*, 283 F. Supp. 3d at 397 (finding an individual had standing to challenge a county's voter purge, initiated by returned mail marked "undeliverable," "when his right to remain registered to vote was challenged *before*

[12] While it is true the court in *Stewart* noted "standing does not depend on any injury suffered in a previous election," the court nonetheless supported its holding by with statistics regarding "residual votes" from the 2000 general election. *Id.* at 848, 855.

the 2016 election," and there was an allegation that he "remained at risk of being harmed by the Defendants in a similar manner in future elections," even though he had not personally been purged from the voter rolls (emphasis added)); *Black*, 209 F. Supp. 2d at 894–95 (finding a sufficient "probabilistic injury" to confer standing for a challenge to punch card voting machines or non-notice optical scanners, when *past elections* showed a "particularly high residual vote rate[]" was present).

Yet Appellants have failed to allege any prior incident regarding third-party hackers in South Carolina, or malfunctioning voting machines in their counties, that would enable the Court to look forward and find a "substantial risk" of such an injury in the future. Unlike the plaintiffs in *Arcia*, here Appellants have not alleged they have ever been disenfranchised either before, during, or after an election. Unlike the machines at issue in *Stewart* and *Black*, here the DRE machines do not have a storied history, in either South Carolina or Appellants' specific counties of residence, of "inevitably" resulting in quantifiable residual votes—or other constitutional injuries for that matter—as the punch-card voting machines did in the early 2000s. Further, unlike the plaintiffs allegations in *Curling* and *NAACP*, Appellants have not alleged that any of their prior votes have gone uncounted, or that they will stop voting because of the machines, or that their right to vote has been challenged by Appellees in the past, or that South Carolina's current voting system has ever been— or is even targeted to be—hacked.

What is more, as to the alleged risk of voting machine malfunction, Appellants have only alleged isolated incidents of malfunctioning voting machines occurring in various counties where Appellants do not reside. J.A. at 35–38. *See, e.g., Stewart*, 444 F.3d at 854 ("It has been stipulated that at least one of the plaintiffs, all of whom are registered voters, resides in each defendant-county."). While such malfunctions are possible, which the Court can assume is true based upon the allegations, the Court is nonetheless prohibited from "embellishing" those random, isolated statewide incidents to conjure up a plausible "substantial risk" of injury as to these specific Appellants where they specifically vote. *Whitmore*, 495 U.S. at 155–56. Notably, Appellants omit the fact that the malfunctions cited in the LAC Report were "largely categorized as human errors rather than mechanical errors." J.A. at 498. Further, the enumerated "systemic deficiencies" referenced in Appellants' complaint, J.A. at 37, only show that the system is old and requires maintenance—not that such deficiencies create a "substantial risk" of constitutional injuries to voters in the future. Indeed, even when Appellants allege incidents of past malfunctioning on Election Day, there is no allegation that any voter was actually unable to vote or had their vote counted inaccurately without remediation. J.A. at 38 (alleging that a under three dozen voting machines stopped working in Greenville County, resulting in long lines, and that some machines broke in several other

counties, yet making no allegations that votes were lost or uncounted due to the machines themselves or the "deficiencies" listed).

Further, Appellants allege a hypothetical situation wherein the iVotronic machines could be hacked, the results corrupted, and the system infected so as to eliminate any ability to "meaningfully"[13] audit the results. J.A. at 16 ("A successful cyberattack *could* unfold consistently across parts or all of the iVotronic system, from a single machine to the tallying of vote totals across counties, leaving no way to identify the damage." (emphasis added)). Again, while at the motion to dismiss stage the Court is constrained to assume the truth such an allegation, the allegation only shows that such an injury *could* be possible. This alone does not demonstrate plausibility. *See South Carolina State Election Commission,* Voting System Facts, available at https://www.scvotes.org/voting-system-facts (last accessed May 6, 2019) ("Each touch screen voting machine has three independent, but redundant, memory paths that ensure no votes will be lost, altered or miscounted."). While it is true the Election Commission would be unable to audit an un-auditable attack on the voting system, Appellants fail to allege such a hack has ever actually happened in

[13] It is also worth noting that while Appellants contest the "meaningfulness" of election audits by the Election Commission, the Election Commission has systematically audited every recent election. *See South Carolina State Election Commission*, Election Audits in South Carolina, available at https://www.scvotes.org/election-audits-south-carolina (last accessed May 6, 2019). Indeed, even Appellant Heindel alleges to have "audited" South Carolina's previous election results. J.A. at 18.

the history of U.S. elections or is anything beyond a hypothetical injury (let alone a substantial risk of such an attack actually occurring). *See Lujan*, 504 U.S. at 560 (requiring that an injury not be "imminent" not "hypothetical").

Simply put, Appellants are attempting to break new ground on standing doctrine. They claim standing to assert injuries they have failed to allege have ever affected their votes in the past or their conduct in the future (*i.e.,* the threat of hacking or a malfunctioning voting machine), have ever occurred in the history of their counties (*i.e.,* malfunctioning voting machines), or have ever occurred in the history of the state (*i.e.,* targeting or successful hacking of the voting system).

ii. Appellant's new test for standing is not controlling, effective, or grounded in persuasive precedent.

Perhaps acknowledging the implausibility of their allegations and the novelty of their legal positions, Appellants attempt to articulate a new standard for pleading standing in the voting machine context. Ostensibly based upon the cases discussed above, Appellants set forth three elements or prongs that purportedly demonstrate standing is proper in this case:

> (1) [Appellants] are subject to [a] challenged system . . . ; (2) the defects in that system place [Appellants'] votes at substantial risk of going uncounted; and (3) it is impossible to know with certainty which votes will be affected in future elections, or (because of the lack of audits) to confirm whether votes have been accurately counted.

Appellant Br. 25.

This test fails for three reasons. First, as was demonstrated above, the cases Appellants cite in support of this new standard are factually dissimilar to the instant case. Appellants seem to recognize the stark factual distinctions as well, phrasing their own test two different ways in their brief. *Compare* Appellant Br. 21 *with* Appellant Br. 25. Nevertheless, to derive a new test from cases which share only the broad theme of "voting rights" (relying heavily on pre-enforcement cases) or similar claims but dissimilar allegations (such as *Curling* or *Stewart*) not only lacks persuasion but is unnecessary in light of the clearly articulated standards in *Lujan*, *Clapper*, and their progeny.

Second, Appellants create false equivalencies with several critical facts in the cases used to support their new standard. For instance, as discussed above, a purportedly unconstitutional policy cannot be considered the functional equivalent to a purportedly unconstitutional voting machine. Policies are black-and-white articulations of a position, which can be compared and contrasted to federal statutes or constitutional provisions. Voting machines, however, are merely tangible objects which facilitate the voting process, and have to be analyzed in the specific context in which they reside based upon their results. Simply stated, voting machines and policies are distinct and require different allegations to show if a constitutionally injurious result has occurred or is imminent.

Third, Appellants new test attempts to integrate a strawman argument into the standing analysis. Specifically, Appellants propose standing is proper when there is an allegation that "it would be impossible to know with certainty which votes will be affected in future elections, or . . . confirm whether votes have been accurately counted." Yet, in no cases cited by the Appellants is the absence of "certainty" or the inability to confirm the accuracy of a vote integral to a court's standing rationale. While such inability might be an ancillary fact to such a determination, *see Black*, 209 F. Supp. 2d at 895, the absence of certainty makes the analysis harder—not clearer. And further, it pulls this Court away from the standard set forth in *Clapper*, requiring a "certainly impending" injury-in-fact. Appellant's proposal is merely a strawman, set up to be knocked down by their inability to allege prior incidents or current facts that would legitimatize a "substantial risk" of future harm to them specifically.

At bottom, Appellants new test draws upon factually distinct cases, rests upon false equivalencies, and develops a strawman argument in support of their position. Accordingly, the Court should reject Appellants' invitation to turn aside from the Supreme Court's clearly articulated standards for alleging standing in the context of a future injury.

4. Appellant Heindel's personal expenditures do not constitute an injury-in-fact.

Costs incurred as a reasonable reaction to a risk of harm that is not "certainly impending" cannot support standing. *Clapper*, 568 U.S. at 416. "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.* Here, Appellant Heindel seems to imply in his complaint and brief that standing could be possible based upon personal expenses he has incurred researching the iVotronic voting system. Appellant Br. 31; J.A. at 66 ("I have felt compelled to absorb these costs because I believe the state's voting system, and in particular its use of iVotronic Direct Recording Electronic (DRE) machines, is deeply unreliable and fundamentally unverifiable."). Yet, as demonstrated above, these costs are associated with a speculative fear of hacking that is not certainly impending. *Supra* Part III.A.3.a. Thus, such expenditures cannot support standing.

This Court and others have reached the same conclusion. *See, e.g., Beck*, 848 F.3d at 276–77 ("[Plaintiffs] also say that, as a consequence of the breaches, they have incurred the burden of monitoring their financial and credit information. Even accepting these allegations as true, they do not constitute an injury-in-fact. As was the case in *Clapper*, the Plaintiffs here seek 'to bring this action based on costs they incurred in response to a speculative threat,' *i.e.* their fear of future identity theft based on the breaches at Dorn VAMC. *Id.* at 1151. But this allegation is merely 'a

repackaged version of [Plaintiffs'] first failed theory of standing.' *Id.* Simply put, these self-imposed harms cannot confer standing."); *Chambliss v. Carefirst, Inc*, 189 F. Supp. 3d 564, 571 (D. Md. 2016) ("In the context of data breach litigation, courts have consistently held that a plaintiff may not use mitigation costs alone to establish a cognizable injury in fact. . . . Rather, the plaintiff must first show that the harm is "certainly impending" before costs to mitigate against that risk will also be an injury in fact.").

* * *

In order to allege standing, Appellants must show that they have a plausible, imminent injury-in-fact. Appellants allege two main constitutional injuries: (1) the deprivation of their voting rights resulting from a future hack by third-parties on the iVotronic machines at some point in the future; and (2) the deprivation of their voting rights due to the possibility of a malfunctioning iVotronic voting machine at some point in the future. However, Appellants allegation of a potential future hack of South Carolina's statewide voting system rests upon a speculative, chain of possibilities. Thus, the injury cannot be "certainly impending," and accordingly there can be no "substantial risk" of that harm occurring. Further, Appellants have merely alleged the possibility of a voting machine malfunctioning, based not upon personal experience or reports of malfunctioning machines in their counties of residence, but upon third-party sources regarding prior versions of the machines or

reports of random and isolated malfunctions in neighboring counties. Such allegations do not plausibly allege a "substantial risk" of future injury to these specific Appellants in their respective counties. In sum, Appellants have failed to allege any imminent injury-in-fact.

B. Appellants fail to allege any hacking would be "fairly traceable" to actions by the Appellees

In addition to pleading an injury-in-fact, "there must [also] be a causal connection between the injury and the conduct complained of . . . ." *Lujan*, 504 U.S. at 560. Stated differently, "the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.'" *Id.* (alterations omitted). Further, "it may be particularly difficult for an indirectly affected party to satisfy the causation . . . requirement[]." *Bishop*, 575 F.3d at 425. Even at the pleading stage, when the harm and the challenged conduct are connected by an attenuated "line of causation," such speculation cannot adequately support causation. *Id.* Indeed, "[i]n a variety of circumstances, standing has been denied because the possible causal nexus seems too remote and uncertain, even though there may in fact be a causal link." 13A Charles Alan Wright, Arthur R. Miller & Edward Cooper, *Federal Practice and Procedure* § 3531.5 (3d ed. 2019).

Here, Appellants' main alleged injury emanates from the uncertain threat of third-party hackers who would successfully attack South Carolina's voting system—despite the Election Commission's efforts to thwart such attacks. This injury cannot be fairly traced to the Election Commission for two reasons: (1) any injury resulting from a possible future hack of South Carolina's voting system would be the result of independent third-parties not before the Court; and (2) any causal connection between the Election Commission, third-party hackers, and Appellants' possible future injury is too "remote and uncertain."

First, any alleged injury resulting from hacking arises at the hands of third-party hackers—not the Election Commission. Hackers are the quintessential third-party. They are not under the jurisdiction of the Court. Their actions are independent from the Election Commission and cannot be predicted in advance. Indeed, documents incorporated into Appellants' complaint show that the Election Commission has worked to prevent any would-be hackers—not enable them. J.A. at 427. Nonetheless, Appellants contend that the presence of third-party in the causation analysis does not *per se* defeat a finding of standing. Appellant Br. 42.

Again looking for an exception to swallow the rule, Appellants cite to several cases where third-parties were present in the factual backgrounds. *Id.* (citing *Driehaus*, 573 U.S. at 164; *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 315 (4th Cir. 2013)). Yet those cases are not directed at injuries caused by third-parties,

but rather injuries caused by a statute or policy implemented or administered by the defendants. In *Driehaus*, which did not address the causation prong of standing at all, it was not the conduct of third-parties that was being challenged, but rather the enforcement of a statute. *Driehaus*, 573 U.S. at 164 (recognizing the fact that third parties could submit a complaint merely "bolstered," and did not establish, the credible threat of prosecution by the state for the purposes of demonstrating an injury-in-fact—not causation).

Similarly, in *Judd* this Court held a plaintiff had standing to challenge a balloting statute as unconstitutional when the statute "at least in part" was responsible for frustrating the plaintiff's First Amendment rights. *Judd*, 718 F.3d at 315. There the plaintiff, who had suffered a knee injury, brought suit challenging the constitutionality of a Virginia statute requiring ballot circulators to be residents of the state in order to obtain signatures. *Id.* The defendants conceded the plaintiff's "theory of [constitutional] injury could on its face support his case," but argued the plaintiff's physical incapacity, the knee injury, "trump[ed] the legal incapacity created by the" allegedly unconstitutional statute. *Id.* This Court ultimately rejected the defendants' arguments, finding the defendants were "at least in part responsible for frustrating [the plaintiff's]" constitutional rights. *Id.* at 316.

Yet here, Appellees do not concede Appellants have alleged an injury sufficient support standing on its face. Nor do Appellees assert that any "legal

incapacity" or injury is "trumped" by some other injury or cause to the Appellants. Rather, the sole origin of the alleged constitutional injury rests upon the choices of third-party hackers who decide whether to attack South Carolina's voting system—*i.e.*, actions by independent actors not before the Court. J.A. at 16. ("As a result, a hacker *might cause* largescale disruption by attacking one or more counties, *potentially* creating distrust and confusion that *could* affect the entire state." (emphasis added)). In *Judd*, it was clear the statute, and not the knee injury, was the main cause of plaintiff's harm. Here, it is likewise clear that hackers, not the Election Commission, would be the main cause of Appellants' alleged future harm. Stated plainly, finding the Election Commission tangentially liable for the unpredictable conduct of independent third-parties does not comport with the Supreme Court's holding in *Lujan*. *See Lujan*, 504 U.S. at 560 ("[T]he result of the independent action of some third party not before the court," is not "fairly traceable" to a defendant.).

Second, such a future constitutional injury resulting from hacking remains speculative, remote, and uncertain. As demonstrated above, Appellants' allegations are based upon a highly attenuated chain of possibilities leading to the dilution of their votes through hacking. *See* Part III.A.3.a. Simply looking to the alleged injury itself, it is clear that any causal connection between initially approving and adopting the machines, and the later development of a possible threat against those machines, is likewise too attenuated to impose liability on the Election Commission. The policy

implications of finding otherwise are clear: constitutional liability would expand and attach to all state election commissions for all possible emerging threats that could impact votes at some point in the future. This would be the case regardless of whether their states have been targeted, or the threat arises from independent third-parties, or there is any indication as to its imminence, or the threat could have been anticipated, or replacing the machines is feasible. Simply stated, speculative allegations of a possible future cyber-attack are precisely the type of third-party conduct that cannot be "fairly traced" to the Election Commission.

As to Appellant Heindel's expenditure of money to investigate the threat of potential hackers on South Carolina election infrastructure, such expenses are not fairly traceable to any conduct by the Election Commission, and cannot confer standing. Namely because such expenses are tied to Appellants own beliefs that the system is flawed and susceptible to hacking and not a "certainly impending" injury-in-fact:

> Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. Any ongoing injuries that respondents are suffering are not fairly traceable to [the challenged statute].

Clapper, 568 U.S. at 416. *See also supra* Part III.A.3.a. This is precisely what Appellants attempt to allege here: funds expended based upon "fears of a hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416.

In sum, as made clear in *Clapper* and this Court's precedent, an injury cannot be fairly traceable when it is based on an attenuated line of causation or is not certainly impending. Most importantly, Appellants' alleged constitutional injuries mainly arise from the conduct of independent third-parties not before the Court: hackers. Accordingly, the Court cannot find the alleged future injuries fairly traceable to the Election Commission.

C. Appellants fail to allege an injury that is "likely" to be redressed by a favorable decision from the Court.

In order for a court to confer standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. In the context of injunctive relief, a plaintiff must allege "a continuing violation or the imminence of a future violation." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998). "However, if the redress requires action by a third party, it does not fulfill Article III redressability." *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733, 748 (D.S.C. 2017) (citing *Lujan*, 504 U.S. at 569). In short, "[t]he redressability requirement ensures that a plaintiff 'personally would benefit in a tangible way from the court's intervention.'"

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 162 (4th Cir. 2000) (citing *Warth*, 422 U.S. at 508).

Here, Appellants complaint fails to show how they would benefit from the Court's intervention. At the outset, the lack of a "certainly impending," imminent injury-in-fact forecloses on a finding of redressability—since Appellants have failed to sufficiently allege the imminence of a future injury. *See Steel Co.*, 523 U.S. at 108; *supra* Part III.A.3.a.

Lastly, it is speculative whether such an order would provide tangible relief to Appellants for several reasons. To start, any court order would not compel the Election Commission to do anything different than what it is already doing (*i.e.,* procuring a new statewide voting system). And even if the Court were to order the Election Commission to procure a new machine, such a procurement would still be subject to South Carolina's procurement code. *See* S.C. Code Ann. § 7-13-1655(b)(4); S.C. Code Ann. § 11-35-10, *et seq.* Accordingly, such relief would nonetheless be dependent on the Election Commission's successful navigation of the procurement process—something the Court cannot dictate or avoid shy of overriding numerous state statutes and the agency's executive authority. *South Carolina v. United States*, 912 F.3d 720, 728–29 (4th Cir. 2019) (recognizing that the doctrine of standing rests on separation of powers principles and "serves to prevent the judicial process from being used to usurp the powers of the political branches."

(citing *Clapper*, 568 U.S. at 408)). Respectfully, any order issued by the Court would be largely superfluous to the State's ongoing procurement of the new voting system. Indeed, this Court has long recognized that the federal judiciary, absent class-based discrimination or restrictive election laws, should not interfere with a State's administration of an election or related legislative endeavors. *Hutchinson v. Miller*, 797 F.2d 1279, 1280 (4th Cir. 1986).

What is more, any court order would do nothing to bind the third-party hackers—not currently before the Court—who allegedly wish to do America's elections harm. *See Doe v. Obama*, 631 F.3d 157, 161 (4th Cir. 2011) ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (quotations omitted))); *supra* Part III.B. That is to say, even if the Court orders a new voting system be procured, and provided the Court accepts Appellants' argument that an allegation of a general threat to America's election infrastructure is equivalent to a specific threat upon South Carolina's voting system, it is still speculative that any order from the Court would diminish the threat of hacking or the risk of voting machine malfunction.

Stated as a question: does the alleged threat to South Carolina's elections "likely" subside or the risk of voting machine malfunction abate by compelling a new paper-centric voting system? Or does the threat evolve? And do the potential malfunctions take new form? And if the threat does evolve and new malfunctions do occur, what becomes of the relief afforded by the Court? The Court cannot order a perfect election, nor can it afford relief to plaintiffs in the absence of a "certainly impending" injury "fairly traceable" to the Appellees. J.A. at 676 ("The standard is not a perfect system. And our clients do not have a right to a perfect system. There is no such thing as a perfect system."). Yet that appears to be the relief Appellants ultimately seek. Accordingly, Appellants have failed to allege a redressable injury-in-fact.

IV. Conclusion

A possible injury is not the same as a plausible injury. To find standing here, based upon Appellants' allegedly possible injuries, would greatly expand not only standing doctrine but coextensively the power of the judiciary. As Justice Powell warned, "[r]elaxation of standing requirements is directly related to the expansion of judicial power . . . ." *Richardson,* 418 U.S. at 188 (Powell, J., concurring). Thus, the Court should decline Appellants' invitation to expand judicial power, and find that only plausible—not possible—allegations of an injury-in-fact, fairly traceable

to the Appellees, and likely to be redressed by a favorable decision, will suffice for standing.

Accordingly, for the aforementioned reasons, the Court should affirm the decision of the District Court and find Appellants lack standing.

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, the undersigned counsel for Defendants-Appellees certifies that the accompanying brief is printed in a proportionally spaced Times New Roman typeface, 14 point font, and that the text of the brief comprises 12,944 words, excluding the parts of the document excepted by Fed. R. Civ. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on May 7, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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